U.S. Department of Labor

Office of Administrative Law Judges
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Date: October 4, 2000

Case No.: 2000-LHC-179

OWCP No.: 07-139080

In the Matter of:

BONNIE PATRICK,
Claimant

against

INGALLS SHIPBUILDING, INC.,
Employer

APPEARANCES:

SUE ESTHER DULIN, ESQ.
On behalf of the Claimant

PAUL B. HOWELL, ESQ.
On behalf of Employer

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Worker's Compensation Act (hereinafter "the Act"), 33 U.S.C. § 901, et seq., brought by Bonnie Patrick ("Claimant") against Ingalls Shipbuilding, Inc. ("Employer") for injuries allegedly sustained during the construction of a vessel at Ingalls' shipyard in Mississippi.

The issues raised here could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held April 21, 2000 in Gulfport, Mississippi.

STIPULATIONS

Prior to the hearing, the parties agreed to a joint stipulation (JX-1):[1]

1. The Claimant was injured on March 13, 1996 at Ingalls Shipyard;

2. The injury occurred while the Claimant was engaged in the construction of Naval vessels alongside the navigable waters of the Gulf of Mexico in Pascagoula, MS.;

3. The injury occurred while the Claimant was in the course and scope of her employment;

4. An employer/employee relationship existed between the Claimant and Respondent at the time of the injury;

5. The Employer was advised of the injury on March 13, 1996;

6. A Notice of Controversion was filed April 2, 1996;

7. An informal conference was held between the parties on August 27, 1999;

8. Employer has voluntarily paid and Claimant was entitled to medical benefits and benefits for temporary total disability in the total amount of $36,214.04.

ISSUES

The parties listed the following issues as disputed on the joint stipulation:

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[1] The following references will be used: TX for the official hearing transcript; JX-__ for Joint exhibits; CX-__ for the Claimant's exhibits; and RX-__ for Employer's exhibits.

1. Claimant's average weekly wage at the time of the injury;

2. Claimant's date of Maximum Medical Improvement;

3. The Nature and Extent of Claimant's disability;

The parties also listed the following specific issues as unresolved:

1. The Employer's entitlement to Special Fund relief under section 8(f) of the Act;

2. The date at which the Claimant reached Maximum Medical Improvement;

3. The Claimant's average weekly wage at the time of the accident;

4. Whether the Claimant's hip injury is a scheduled or unscheduled injury within the meaning of section 8 of the Act;

5. The Claimant's entitlement to a *de minimis* award for her disability, if any;

6. The Nature and Extent of the Claimant's disability, if any, and her entitlement to an award for permanent and total disability from February 24, 1999 until April 12, 1999 and from September 3, 1999 until October 4, 1999.

SUMMARY OF FACTS

I. Claimant's Employment

Bonnie Patrick (Claimant), began working for Ingalls Shipbuilding, Inc. (Employer) in Pascagoula, MS. on or about July 22, 1974. (RX-25, p.8). She was hired as a shipfitter. (RX-25, p. 8). Her job duties as a shipfitter included metal fabrication and the building of component parts for vessels that were under construction or being rebuilt in Employer's facility. (RX-25, p. 8). Claimant worked for the Employer in this capacity until her injury in March of 1996. (RX-25, p. 8). Following her injury, Claimant Returned to work with Employer. (RX-25, p. 33, *et seq.*). The Claimant returned to the same position in which she was injured, but was limited by certain permanent restrictions established by her doctors. (RX-25, p. 33).

II. Claimant's Injury and Treatment

The Injury

Claimant was injured on the morning of March 13, 1996, while working as a First Class Shipfitter at Employer's aluminum fabrication shop at the Ingalls Shipyard in Pascagoula, MS. (TX, p. 36). On that morning, Claimant picked up a piece of aluminum to put it together with another component. When she picked up the piece she pulled something in her back. (TX, p. 37). The Claimant estimates that the aluminum she picked up weighed between 50 and 60 pounds. There were no witnesses to the accident. The Claimant finished reported the injury to her supervisor and finished working that day. (TX, p. 37).

The Claimant testified at trial that she continued to work until March 25. (TX, p. 38). When the pain in her back did not improve and began to get worse, Claimant asked her supervisor for a hospital pass. (TX, p. 38). The pass was issued, and Claimant went to Ingalls hospital where she saw Dr. Warfield. (TX, p.38). Dr. Warfield treated the Claimant for her injury. He told the Claimant to rest and provided her with a prescription for Tylenol #3. (CX-7, p. 68). Dr. Warfield returned Claimant to work with restrictions on April 1, 1996. (CX-7, p. 65).

Medical Treatment

There is but a single, undisputed set of medical records for the Claimant's treatment related to this accident. Identical sets of medical records were entered into evidence by the parties at trial. These records reflect the following treatment history for the Claimant.

On April 19, 1996 Claimant returned to the Ingalls hospital and reported that her pain was continuing and that it was now radiating down her left leg to her foot. (CX-7, p. 65). Dr. Warfield then referred the Claimant to an orthopedist for additional assistance. (CX-7, p. 65). On April 19, 1996 the Claimant completed a Choice of Physician form selecting Dr. Manolakas, as an orthopedist and primary physician for this injury.[2]

Dr. Manolakas

Dr. Manolakas originally evaluated Claimant on April 25, 1999 at his office in Ocean Springs, MS. Upon evaluation and physical examination of the Claimant, Dr. Manolakas opined that the Claimant might suffer from Lumbar radiculitis. His impression was that this radiculitis might relate to a bulging or inflamed disc at the L5-S1 level. Dr. Manolakas ordered physical therapy and restricted the Claimant to lifting no more than 20 pounds with moderate bending and stooping and no climbing. He also sent her to physical

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[2]The Court notes that Dr. Robert Manolakas' letterhead lists his specialty as medical rehabilitation. (CX-9, p. 9). The Court does not believe this discrepancy is critical to our decision.

therapy with Rehability. Dr. Manolakas prescribed a Medrol Dosepak for the relief of the Claimant's pain and sent her for a lumbosacral spine series of x-rays. (CX-9, p. 27).

When the Claimant returned to follow up with Dr. Manolakas on May 2, 1996, he indicated that she was doing well with her course of therapy and that she was tolerating work fairly well. He injected the Claimant's one tender trigger point with 1% Xylocaine and Celestone[3] and returned her to work with her restrictions and instructions to continue physical therapy. The office note from that visit indicates that the x-rays of the Claimant's lower back were normal. (CX-9, p. 23). Dr. Manolakas returned the Claimant to regular work as of May 13, 1996. His decision was based on her continued progress with physical therapy and the continued improvement of her back. (CX-9, p. 18).

By May 29, 1996, however, it was apparent that Claimant's lower back pain was continuing. She returned to see Dr. Manolakas. He evaluated Claimant and determined that she might have a bulging/herniated disc in her back. He took her off work for the time being and ordered an MRI. He also prescribed another Medrol Dosepak for the Claimant. (CX-9, p.13). At her next appointment, Dr. Manolakas reviewed the MRI and determined that it showed several mild disc bulges, but no herniations. He injected two additional trigger points with the same mixture of Xylocaine and Celestone, and returned her to work. His return to work order restricted her to lifting of no more than 20 pounds and infrequent bending. (CX-9, p. 12).

The following Friday, Claimant presented to Dr. Manolakas' office in tears. She had continued pain in her right thigh and back. Dr. Manolakas states that he believes the patient's complaints are consistent and that she is not exaggerating her symptoms. He referred her to Dr. McCloskey for a surgical evaluation on the bulging discs in her back. (CX-9, p.10).

Dr. McCloskey

Dr. McCloskey performed an initial examination of the Claimant on June 13, 1996. Based on his evaluation, he ordered a myelogram. (CX-10, p. 156). The results of the myelogram and a contemporaneous CAT scan indicated to McCloskey that the Claimant was suffering from a disc herniation at the L-4 level. He suggested that Claimant was a good surgical candidate. He sent her for a second

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[3]This mixture is a combination of a local anesthetic and a cortisone substitute used for the adjunctive therapy of rheumatic disorders including bursitis. Physician's Desk Reference (PDR), 52d. Ed., 1998, p. 2612.

opinion with Dr. Howard Smith in Ocean Springs. (CX-10, p. 154). Dr. Smith concurred with the diagnosis and opinion of Dr. McCloskey. (CX-10, p. 154).

Based on these two opinions, Dr. McCloskey performed a Microdiskectomy on the L-4 left disc on July 11, 1996. (CX-10, p. 153). The operation went well, and the Claimant was discharged the following day with a prescription for Lortab 5[4], a Medrol Dosepak[5], and Pepcid[6]. Dr. McCloskey instructed the Claimant to return to his office on July 26, 1996 for suture removal. (CX-10, p. 152).

From this date until February 24, 1997, Claimant recovered from her surgery and attended physical therapy. She was returned to work on January 6, 1997. Dr. McCloskey felt that Claimant had reached maximum medical improvement as of that date, and that she suffered from a 10% whole body permanent partial physical impairment. (CX-10, p. 145). Claimant did not return to Dr. McCloskey's care until March 19, 1997. On that date she returned to his office complaining of recurrent low back and left leg pain. (CX-10, p. 144). Dr. McCloskey felt that the Claimant had a post-lumbar laminectomy syndrome, and that she was overweight. (CX-10, p. 144). Dr. McCloskey prescribed Daypro[7] and ordered a CAT scan of the Claimant's lower back. (CX-10, p. 144). The CAT scan came back normal, but Dr. McCloskey states that he could not tell if there was a problem at the L-4 level because he could not identify any problem areas through the scar tissue from the previous operation. (CX-10, p. 141).

To further aid with his diagnosis, Dr. McCloskey ordered another lumbar myelogram. (CX-10, p. 141). He reported that the results of the myelogram seemed minor, but that he needed to consult with the Claimant again. (CX-10, p. 140). When Claimant revisited Dr. McCloskey on June 5, 1997, she reported that her pain had not improved. Although the myelogram showed only minor abnormalities and

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[4]Lortab 5 is a semisynthetic narcotic analgesic and antitussive used for the relief of moderate to moderately severe pain. PDR p. 2926-7.

[5]*See footnote 3, supra*.

[6]Pepcid is a histamine H_2-receptor antagonist used to treat ulcers and GERD. PDR, p. 1716-7.

[7]Daypro is an NSAID used for treatment of acute and long term treatment of osteo- and rheumatoid arthritis. PDR, p. 2730-1.

the Claimant was continuing to work, the doctor tried to aid her pain with Neurontin[8]. He pointed out that at this time there was a mild bulging at the L-5 level, and that this might be significant. (CX-10, p. 137). The Claimant's continuing symptoms caused Dr. McCloskey to send her for another second opinion. Claimant saw Dr. Smith, the same doctor she had previously seen in second opinion for this evaluation. (CX-10, p. 134).

Dr. Smith in second opinion recommended that the Claimant have another surgery to attempt to correct the bulging disc problem. (CX-12, p. 1). Dr. McCloskey concurred in this decision and began the process to set up the additional surgery. (CX-10, pp.131-133). The surgery was performed on August 21, 1997. Dr. McCloskey performed decompressions on L-4 and L-5 on the left side and also a redo diskectomy. The patient reported decreased back pain after the surgery and was released from the hospital on August 24, 1997. (CX-10, p. 128). The doctors prescribed Lortab and a Medrol Dosepak.

Following the surgery, the Claimant reported good results with the occasional return of slight leg pain. She said that her complaints now are minor compared to those prior to the surgery. (CX-10, p. 122). Claimant attended physical therapy from shortly after the surgery until October 30, 1997. She achieved good results from the physical therapy. On October 30, however, she followed up with Dr. McCloskey and reported that she was still having pain, numbness, and burning in her left leg. The Claimant reported that she could not sit for any period without her left leg beginning to hurt. (CX-10, p. 115). Dr. McCloskey instructed the Claimant to continue her physical therapy and prescribed Naprosyn[9] and Darvocet[10] to help her with her condition. (CX-10, p. 113).

In early December of 1997, Claimant wrote a letter to Dr. McCloskey informing him that she was still having significant pain in her hip and that although the Darvocet was helping, it was not enough to keep the pain away on a continuing basis. (CX-10, p. 107). The doctor changed her prescription to Lortab 5, and set up an appointment with her for December 29, 1997. (CX-10, p. 106). On January 11, 1998, the pain was so bad that the Claimant was forced to seek treatment at Singing River Hospital's Emergency Department. The medical staff there continued her on Darvocet and also prescribed Daypro in an effort to help with the pain. (CX-10, p. 96). When Dr. McCloskey saw the patient again on January 22, 1998, he identified the hip pain. His impression on that day was that Claimant's hip pain had developed with and

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[8]Neurontin is gabapentin, which is used as adjunctive therapy in the treatment of partial seizures with and without secondary generalization in adults with epilepsy. PDR, 2111.

[9]Naprosyn is a member of the arylacetic group of NSAIDs and is indicated for the treatments of tendinitis, bursitis, gout, and management of pain. PDR, p. 2458-9.

[10]Darvocet is propoxyphene, a centrally acting narcotic analgesic used to relieve mild to moderate pain alone or with a fever. PDR, 1444.

as part of her ongoing back problems and back surgery. He referred her to Dr. Cope for an opinion about the condition of her hip. (CX-10, p. 90).

Dr. McCloskey continued to treat the Claimant until the time of trial. The majority of the significant medical records from the following period, however, come from the medical treatment rendered by Dr. Cope. Based upon a review of his medical records in this case, Dr. McCloskey opined that the Claimant had reached maximum medical improvement with respect to her lower back as of April 8, 1998. He indicated that she had a 15% permanent partial physical impairment to her body as a whole based on her two lower back operations and her hip problem. (CX-10, p. 69).

Dr. Cope

Doctor McCloskey referred the Claimant to the care of Dr. John Cope for evaluation of her hip injury. Cope first saw the Claimant on January 29, 1998. His medical evaluation on that date lead him to the conclusion that the Claimant was suffering from Trochanteric Bursitis in her left hip and that she might be experiencing early degenerative changes in the left hip. (CX-11, p. 38). He injected her greater left hip area with a mixture of Xylocaine, Marcaine, and DepoMedrol and instructed her to follow up with his office as needed. (CX-11, p. 38).

By April 9, 1998, the Claimant's bursitis had resolved itself to the point where Dr. Cope felt treatment was no longer necessary. He discontinued treatment at that time and instructed the Claimant to recheck with his office as necessary. (CX-11, p. 36). The final shot given on that day helped the Claimant to deal with her symptoms for several months. In June of 1998 she returned to Dr. Cope and told him that the pain in her hip had returned. He gave her another injection and recommended that, because the Claimant's complaints of hip pain were reasonably consistent, she might consider having a trochanteric bursectomy if the symptoms continued and were sever enough. (CX-11, p. 34).

When the shot that Dr. Cope administered on June 4, 1998 did not provide the Claimant with any relief, she returned to his office. On June 18, 1998 he assessed the Claimant as having subacute trochanteric bursitis in the left hip and sought to rule out a stress fracture. He ordered a bone scan and instructed the Claimant to recheck with him following the procedure. (CX-11, p. 33). The bone scan performed on June 23, 1998 showed no abnormalities of the hips. (CX-11, p. 32). Claimant did have some narrowing of the medial hip joint space. Dr. Cope thought that this was a reasonable basis for performing a bursectomy and, after consulting with the Claimant, recommended that procedure. (CX-11, p. 30).

The medical records from Dr. Cope indicate that it is impossible to accurately determine whether the Claimant's hip injury is related to her original back injury and refers that question to Dr. McCloskey. (CX-11, p. 29). Dr. Cope performed a trochanteric bursectomy as recommended on September 2, 1998.

The operation was tolerated well, and the patient was able to leave the hospital on crutches that bore part of her weight. (CX-11, pp.15-17). The Claimant was referred to physical therapy and given a prescription for pain medication. She was restricted to light work for several weeks after this surgery. Six weeks following her operation, Dr. Cope opined in a letter to Dr. McCloskey that the Claimant had reached maximum medical improvement with respect to her hip injury. That letter was based on a follow-up examination performed on October 26, 1998. (CX-11, p. 8). Dr. Cope assigned the patient a 5% permanent partial disability rating because of her hip surgery. (CX-11, p. 5). He released her from active treatment with him on March 1, 1999. (CX-11, p. 1).

After being released from treatment by Dr. Cope, Claimant was returned to work at the Employer's yard with the same restrictions she had prior to her final surgery. (CX-10, p. 36). By March 29, 1999, Claimant had again been taken out of work by Dr. Cope. She talked with the staff at Dr. McCloskey's office, an they agreed to call in an additional prescription for pain medication until the Claimant could see Dr. McCloskey. (CX-10, p.39). Claimant returned to Dr. McCloskey's office on April 8, 1999 complaining of the same lower back and left leg pain for which she had previously received treatment. Dr. McCloskey returned the Claimant to work with the same restrictions on April 12, 1999. (CX-10, pp. 35-37). Dr. McCloskey also referred the Claimant to Dr. Mollie Holtzman for further evaluation and treatment. (CX-10, p. 34).

Dr. Holtzman

By referral from Dr. McCloskey and with approval from the workers' compensation carrier, Claimant saw Dr. Mollie Holtzman, a physiatrist in Ocean Springs, MS., on May 11, 1999. (CX-13, p. 3). Dr. Holtzman carefully reviewed the history of Claimant's illness and evaluated her current condition. She recommended that the Claimant return to physical therapy to attempt to improve her range of motion and her endurance within her pain tolerance. She also recommended that the Claimant take Nortriptyline[11] before bed and that she continue to take Celebrex and Darvocet as needed. (CX-13, p. 3).

Doctor Holtzman saw the Claimant only one other time for a follow-up appointment on June 14, 1997. Her report from that appointment indicates that the Claimant is doing well. Dr. Holtzman felt that most of the Claimant's current hip pain was related to weakness of the hip girdle. She therefore recommended continuing physical therapy and home exercises to the Claimant. Dr. Holtzman opined that following the end of this additional physical therapy, the Claimant would reach maximum medical benefit from the rehabilitation program. She notes that the Claimant is back at work with permanent restrictions which would continue. (CX-13, p. 1).

On September 3, 1999, Claimant had completed treatment under the care of Dr. Holtzman and returned to the care of Dr. McCloskey. She made a return visit to Dr. McCloskey's office on that day and

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[11]Nortriptyline is an anti-depressant. PDR, 1889.

complained of essentially the same problems as before. Dr. McCloskey temporarily removed her from work, prescribed Vioxx and Lortab, and ordered an additional lumbar myelogram. (CX-10, p. 25). The new myelogram showed only minor abnormalities and the possibility of a small degeneration at the L4-5 level. (CX-10, pp. 21-22). Dr. McCloskey returned her to physical therapy and instructed her to wear a back brace when she returned to work. He also prescribed a TENS unit for her to use for pain relief. (CX-10, p. 16).

Ultimately, Dr. McCloskey returned the Claimant to work on her original job with certain permanent restrictions. On April 19, 2000, Dr. McCloskey made a final evaluation of the Claimant. By this time she had since returned to work, and was doing well in her shipfitter's position, although her duties have ben substantially modified to meet her permanent restrictions. Dr. McCloskey's report of the return visit indicates that Claimant's date of maximum medica improvement and her degree of disability are unchanged. (CX-10A).

DISCUSSION

I. Jurisdiction

On the date of the Claimant's injury, she was working as a shipfitter for Ingalls Shipbuilding, Inc. Claimant was assigned to the aluminum fabrication shop at the Ingalls shipyard alongside the navigable waters of the Gulf of Mexico in Pascagoula, MS. The yard in general, and the Claimant specifically, were engaged in the construction of Naval vessels. Claimant was injured in the course and scope of this employment. The Claimant is therefore covered by the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901, et seq. The parties do not contest this determination of jurisdiction. (JX-1).

II. Claimant's Case

There are a few basic issues in dispute in this claim. In the interests of judicial economy, the Court will deal with each in turn.

A. Maximum Medical Improvement

The parties list the date at which the Claimant reached maximum medical improvement as disputed. A careful reading of the medical evidence presented to the Court indicates that there is one certain date of maximum medical improvement for each of the Claimant's injuries.

The Court finds that the Claimant was injured March 13, 1996. She selected Dr. Manolakas as her primary physician through a choice of physician form signed on April 19, 1996. (CX-7, p. 62). Dr. Manolakas subsequently referred the Claimant to Dr. McCloskey who diagnosed her back problem and performed two surgical procedures to correct it. In turn, Dr. McCloskey referred the Claimant to Dr. Cope, who saw her for her hip pain and also performed surgery. Doctor Cope would not give an opinion

as to whether or not the hip injury was related to the Claimant's back pain. (CX-11, pp. 28-29). By way of his letter, Dr. Cope deferred to Dr. McCloskey's opinion about whether or not the Claimant's hip and back injuries were related. Dr. McCloskey believed that both injuries had happened as a result of the same accident. (CX-10, p. 90). In his notes dated January 22, 1998, he explained that he thought there was a relationship between the back injury and the development of the hip pain. That was his primary reason for referring the Claimant to Dr. Cope's care. (CX-10, p. 90).

Ultimately this presents the Court with the independent treatment of two different doctors for two different injuries resulting from the same accident. Each doctor gives a date of maximum medical improvement for the injury he has treated. The Court finds that with respect to her back, the Claimant reached MMI on April 8, 1998. (CX-10, p. 69). With respect to her hip injury, the Court finds that the Claimant reached MMI on October 26, 1998, six months after her last surgery. (CX-10, p. 59). The Court is confident based on the medical evidence before it that the two injuries are the

products of this accident. Therefore, the Claimant reached final maximum medical improvement when both injuries had sufficient time to heal. The Court finds that the date of MMI for purposes of this decision is October 26, 1998.

B. Average Weekly Wage

The second issue in dispute is the Claimant's average weekly wage (AWW) prior to her accident. The Court is puzzled by the difficulty that counsel seems to have in making this simple calculation. Claimant and Respondent present the identical wage information for the Claimant in slightly different formats as CX-5 and RX-5 respectively.

The Court finds based on the Claimant's deposition testimony that Claimant began working for Respondent as a shipfitter on July 22, 1974. (RX-25). She has worked for the company in that capacity relatively continuously since her initial date of hire. This represents a period of employment of more than 22 years. The Court therefore applies section 10(a) of the Act to determine the Claimant's AWW. 33 U.S.C. § 910 (a).

To determine the Claimant's AWW, we divide the Claimant's actual earnings from the 52 weeks prior to the injury by the number of days she actually worked during that period. This determines the average daily wage. This Claimant's wage records show that she made $29,670.68 over the 52 weeks prior to her injury. She actually worked 260 days. (RX-5). Claimant's average daily wage is therefore $114.12. The Court finds that the Claimant is a five day worker. Thus, then next appropriate step in our calculation is to multiply Claimant's average daily wage by 260 days. We then divide the result by 52 to arrive at the AWW. In this case, the AWW is equal to $570.60.

On the basis of our calculations from the identical wage records submitted by the parties, the Court finds that Claimant's AWW is $570.60.

C. To Schedule or not to Schedule[12], that is the question

Claimant's counsel urges the Court to decide that the Claimant is due a scheduled award for a 5% disability to her left leg. This award would be in addition to the Claimant's award for the unscheduled injury to her back.

Respondent's counsel argues that no scheduled recovery is available to this claimant because the scheduled injury was occasioned by an injury to an unscheduled portion of the body. Employer contends that in these circumstances, the Claimant is limited to an award for her injury to an unscheduled portion of her body.

If both a scheduled and an unscheduled injury were present in this case, the Court would find for the Employer. In an almost identical case the ninth circuit has held that, when an employee suffers an accidental work-related injury to his back, he cannot receive an award of scheduled benefits for concurrent partial loss of use of his leg. The Court in that case reasoned that the point of the scheduled award was to provide an easy way to determine the effect of typical disabilities on wage earning capacity. If the Claimant cannot demonstrate a loss of wage earning capacity, then there should be no recovery. *See Long v. Director, OWCP*, 767 F.2d 1578 (9th Cir. 1985); *citing Todd Shipyards Corp. v. Allan*, 666 F.2d 399 (9th Cir.) *cert denied*, 459 U.S. 1034 (1982); *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981).

The Court does not reach that level of analysis in this case, however, because the Claimant has suffered only unscheduled injuries. Claimant's injuries were to her back and her hip. The back injury is clearly not part of the schedule found in section 8(c) of the Act. 33 U.S.C. § 908(c). There is some question as to whether or not the hip injury qualifies as a scheduled or unscheduled injury.

The first problem is whether this Claimant's injury is to the leg or to the hip. It is well settled under the Act that the situs of the injury, and not the situs of the disability is determinative of the right to compensation under the schedule. *See Andrews v. Jeffboat, Inc.*, 23 BRBS 169, 173 n. 4 (1990); *Grimes v. Exxon Company U.S.A.*, 14 BRBS 573, 576 (1981). In this case, the medical reports clearly show that the situs of the injury is the hip. All of the medical evidence speaks of the Claimant's pain as hip pain, or an injury to her hip. Dr. McCloskey referred claimant to Dr. Cope for treatment of suspected trochanteric bursitis. This is an injury to the hip.

Based on the medical evidence presented, the Court finds that the Claimant's injury was to the hip, and not to the leg. An injury to the hip is unscheduled when considered under section 8(c) of the Act. A

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[12](Or both)

finding that the hip is a part of the body distinct from the leg is consistent with the treatment of the hip in a number of jurisdictions. *See, e.g., Strube v. Trans Pacific Container,* 32 BRBS 651 (ALJ); *citing, Thomas v. Hansen*, 524 N.W.2d 145 (Iowa, 1994); *Blackburn v. Allied Chemical Corp.*, 616 S.W.2d 600 (Tenn. 1981); *Ujevich v. Inspiration Consolidated Copper Co.*, 33 P.2d 599 (Ariz. 1934); *Clark v. Clearfield Opera House Co.*, 119 A. 136 (Penn. 1922); *Scamperino v. Federal Envelope Co.*, 288 N.W.2d 477 (Neb. 1980). Therefore, the Court finds that the Claimant's hip injury is compensable under section 8(c)(21) of the Act. 33 U.S.C. § 908(c)(21). Because the Claimant is entitled to compensation only for unscheduled injuries, we do not reach Respondent's question of whether an award for an unscheduled injury preempts an award for a scheduled injury resulting from the same accident in this case.

D. De Minimis Award

Claimant also urges the Court that she is entitled to a *de minimis* award. As with scheduled injuries, a *de minimis* award is a rough and ready way of compensating a claimant for a loss of earning capacity. In Metropolitan Stevedore Co. v. Rambo, 117 S.Ct. 1953 (1997), the Supreme Court ruled that "[a] worker is entitled to nominal compensation under the Longshore and Harbor

Workers' Compensation Act when his work related injury has not diminished his present wage-earning capacity under current circumstances, but there is a significant potential that the injury will cause diminished capacity under future conditions." The Court further held that the probability of future decline is a matter of proof. The standard for that proof is that a nominal award requires a showing of a significant possibility of future decline in wage-earning capacity. See Id. This opinion from the Supreme Court solidifies the Fifth Circuit's position regarding the availability of a *de minimis* award. See generally, Hole v. Miami Shipyards Corp., 640 F.2d 769, 772, 13 BRBS 237 (5th Cir. 1981).

This Claimant does not present us with sufficient evidence that her condition has a significant potential to diminish her future wage earning capacity. The only evidence presented by the Claimant directly addressing this question is the March 24, 2000 letter from Claimant's counsel to Dr. McCloskey. That letter asked Dr. McCloskey to answer certain questions about the Claimant's injury and current condition. Doctor McCloskey gave an affirmative response to question number 10 in that letter. It stated, "[t]here is a significant potential that Bonnie Patrick's industrial injury of March 13, 1996 will cause diminished capacity under future conditions." (CX-10, p. 2). The question put to Dr. McCloskey clearly contemplates the matter of proof established under Rambo. The letter, however, provides no opportunity for Dr. McCloskey to explain his response or to give a detailed medical explanation for his finding. It does not go far enough as evidence under Rambo, because it does not state that this diminished capacity will usher in a corresponding decrease in the Claimant's *earning* capacity. The weight of the evidence considered as a whole indicates that the Respondent is more than willing to work with the Claimant to employ her without violating her permanent restrictions, and the court is given no evidence to suggest that the situation will be otherwise at any time in the future.

Claimant has not proven that there is a significant potential that her injuries will diminish her earning

capacity in the future. Accordingly, this is not an appropriate case for the issuance of a *de minimis* award.

E. The Nature and Extent of Claimant's Disability

Claimant and Respondent dispute the nature and extent of the Claimant's disability. The parties agree that the Respondent has paid, and the Claimant was entitled to benefits for temporary and total disability during the following periods: March 26, 1996 until March 31, 1996; April 21, 1996 until April 25, 1996; May 30, 1996 until June 3, 1996; June 8, 1996 until January 5, 1997; May 12, 1997; June 10, 1997; July 29, 1997 until May 17, 1998; and, July 20, 1998 until November 29, 1998. (JX-1). The parties also agree that the Employer has paid medical benefits to the Claimant for her injuries throughout. (JX-1).

There are only two disputes then. First is whether the Claimant is entitled to Compensation for temporary total disability from February 24, 1999 until April 12, 1999 and from September 3, 1999 until October 4, 1999.[13] Second is whether the Claimant is entitled to an award for permanent partial disability.

With respect to the first dispute, Claimant's medical records indicate that she was placed off work from February 24, 1999 until April 12, 1999 by Dr. Cope. In his March 1, 1999 evaluation, Dr. Cope explained that the Claimant had been off of work since February 24 because she could not work as a result of the pain from her hip and back injuries. (CX-11, pp. 1-2). The court finds that the Claimant was off of work as a result of residual pain from her work related injuries. She was ordered not to go to work by her treating physician because she could not tolerate her regular job duties with her pain. This certainly qualifies as temporary total disability. Claimant is entitled to be compensated for that disability.

Similarly, Dr. McCloskey's medical records show that he pulled the Claimant from work between September 3 and October 4, 1999. (CX-10, pp. 28, 19). The Claimant was taken off of work for this period pending the results of further tests by Dr. McCloskey. Dr. McCloskey explains in his notes that he is removing the Claimant from work because her original symptoms from her injury were recurring. The court finds that this period was also a period of temporary total disability for the Claimant. Accordingly, she is entitled to compensation for the period.

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[13]At trial, Claimant's Counsel urged the court that the Claimant was entitled to payment for permanent total disability for these periods. Obviously, since the Claimant returned to work at the end of each period she is not permanently totally disabled. The court suspects that what Claimant''s counsel meant was that her client should be paid for temporary total disability for these periods. We evaluate that claim as such here.

Claimant is only entitled to compensation for permanent partial disability if she has suffered a decrease in wage-earning capacity as a result of her injury. Section 8(h) of the Act provides that an employee's wage-earning capacity shall be determined by actual earnings if they fairly and reasonably represent the employee's wage-earning capacity. 33 U.S.C. § 908(h). In this case the Claimant has returned to work with Respondent at her previous position. Although she works within her permanent restrictions and indeed has a permanent physical disability rating, the evidence indicates that the Claimant is now making $15.17/hour. Prior to this injury, the Claimant was making $13.80/hour working in the same capacity. (TX, p. 71). Claimant also testified that she works a 40 hour week as much as possible and that she has a good attendance record. (TX, p. 71). Considering this evidence, the court finds that the Claimant has not had a diminished wage earning capacity as a result of her physical disability.

III. Employer's Claim for 8(f) Relief

The Employer's claim for relief under section 8(f) of the Act is moot because the Claimant is not entitled to compensation for a permanent disability. The Court need not reach the questions of timely filing or substantive matters related to the claim for relief under this section.

ORDER

1.Employer shall pay Claimant compensation for temporary total disability from March 26, 1996 until March 31, 1996; April 21, 1996 until April 25, 1996; May 30, 1996 until June 3, 1996; June 8, 1996 until January 5, 1997; May 12, 1997; June 10, 1997; July 29, 1997 until May 17, 1998; and, July 20, 1998 until November 29, 1998; and from February 24, 1999 until April 12, 1999; and, from September 3, 1999 until October 4, 1999. Compensation shall be based on an average weekly wage rate of $570.60;

2. Employer is entitled to credit for any compensation paid to Claimant for the above noted periods;

3. Employer shall pay for or reimburse Claimant for all necessary and reasonable medical care and treatment related to her work-related injury and aggravations;

4. Employer shall pay Claimant interest on any accrued unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the last auction of 52 week United States Treasury Bills as of the date this Decision and Order is filed with the District Director;

5. Claimant's counsel, Sue Esther Dulin, shall have 20 days from receipt of this Order in which to file an attorney fee petition and simultaneously serve a copy of the petition on opposing counsel. Thereafter, Employer shall have 20 days from receipt of the fee petition in which to respond to the petition.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge

RDM/ct